No. 91-14 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORTHERN NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF PRODUCER RESPONDENTS IN OPPOSITION

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20 pp

QUESTIONS PRESENTED

Whether the decisions of this Court construing Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) (1988) ("NGA"), to enable the Commission to regulate the rates for gathering charged by interstate pipelines in connection with jurisdictional sales service, are inapplicable as applied to jurisdictional transportation service.

PARTIES TO THE PROCEEDING

In compliance with this Court's Rule 29.1, Respondents submit a complete list of their companies, parent companies and subsidiaries which are not wholly owned subsidiaries, as follows:

CHEVRON U.S.A. INC.
- Chevron Corporation (parent)
- Atlas Supply Company
- Felix Oil Company
- Pembroke Company, Inc.

MOBIL OIL CORPORATION
- Mobil Corporation (parent)
- Buffalo River Improvement Corporation
- Canner's Steam Company, Inc.
- Collins Pipeline Company
- Felix Oil Company
- Mobil Oil De Mexico, S.A. De C.V.
- Mobil Oil Del Peru (Compania Comercial) S.A.
- Mobil Oil East Africa Limited
- Mobil Oil Guinee
- Mobil Oil Mauritanie
- Mobil Oil Nigeria Limited
- Mobil Tunisie
- Near East Development Corporation
- T & M Terminal Company
- Thums Long Beach Company

MOBIL PRODUCING TEXAS & NEW MEXICO INC.
- Mobil Corporation (parent)
- Canyon Reef Carriers, Inc.
- East Texas Salt Water Disposal Company

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST INC.

Mobil Corporation (parent)
Paloma Pipe Line Company

MOBIL EXPLORATION AND PRODUCING NORTH AMERICA INC.

Mobil Oil Corporation (parent)

TEXACO INC.

(Texaco Inc. has no parent corporation.)
Getty Oil Company
Texam Cogeneration Company
Texaco Pipeline Inc.
Texaco Exploration and Production Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
Norsk Texaco Oil A/S
S.A., Texaco Belgium N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama, S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A.—Productos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.
Texaco Petroleum Company
Texaco Puerto Rico Inc.

Texaco Trinidad, Inc.
Texaco Chemical Company
Texaco International Financial Corporation
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.
Canada Texaco Inc.
Four Star Oil & Gas Company
Texaco Canada Petroleum Inc.
Texaco Refining and Marketing Holdings Inc.

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BRIEF OF PRODUCER RESPONDENTS IN OPPOSITION

STATEMENT OF INTEREST

Producer Respondents, who were active participants in the court proceeding below, are producers and marketers of natural gas who rely upon the gathering and interstate transportation facilities of Petitioner Northern Natural Gas Company ("Northern"), to transport their gas to market for sale to customers in competition with Northern's own merchant service.

Until the advent of Order No. 436, discussed below in part IV of this brief, Producer Respondents were severely handicapped in any effort to compete with interstate pipelines as merchants of gas in the interstate market. There was no "open access" transpor-

tation service whereby producers and marketers could offer a competitive alternative to a consumer's purchases from interstate pipelines. Basically, if a producer wished to make sales in interstate commerce, the viable option was to sell to the pipeline for resale by the pipeline. There were few exceptions, and those exceptions depended upon the voluntary acquiescence of the interstate pipeline in choosing to offer a transportation service.

The opinion below correctly affirms the jurisdiction of the Federal Energy Regulatory Commission ("FERC" or "Commission") to regulate the gathering rates charged by an interstate pipeline for service performed in connection with the pipeline's transportation in interstate commerce, in order to promote competition on the pipeline's system.

STATEMENT OF THE CASE

In order to avoid repetition, the statement of the case by the Solicitor General will generally be adopted. Since the Solicitor General will address all arguments of the Petitioner, this Brief in Opposition to the Petition for Writ of Certiorari is intended to be supplementary.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

ARGUMENT

I. THERE IS NO CONFLICT WITH THE STATUTE NOR THE OPINIONS OF THIS COURT.

The Petitioner acknowledges, in Section I.E. at page 14 of its Petition for Writ of Certiorari, that the Commission has jurisdiction to set the amount for gathering that an interstate pipeline can include in

rates charged for one of its two services subject to the Commission's jurisdiction—sales for resale in interstate commerce—but denies that the Commission has jurisdiction with respect to the other service—transportation in interstate commerce. Section 1(b) of the NGA, 15 U.S.C. § 717(b) (1988).

Both services can commence at the wellhead and move through gathering and transmission lines to delivery points. The basic difference in the two jurisdictional services is that with the sale for resale, the pipeline is also the gas merchant, and with transportation service, a competitor of the pipeline is the gas merchant. In both cases, the pipeline provides the transportation service from the wellhead to the delivery point.

This Court has previously held that the rates charged for the gathering portion of the transportation service included in the rate for sales for resale can be regulated by the Commission. *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 603 (1945); *Federal Power Commission v. Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 506 (1949); and *Interstate Natural Gas Co., Inc. v. Federal Power Commission*, 331 U.S. 682, 693 (1947).

As the court below succinctly held: "[s]ince *Colorado Interstate* permits the regulation of rates for gathering performed in connection with interstate sales, it would be inconsistent to hold that the Commission may not regulate rates for transportation over a pipeline's own gathering facilities performed in connection with admittedly jurisdictional interstate transportation." *Northern Natural Gas Company, Division of Enron Corp. v. Federal Energy Regulatory Com-*

mission, 929 F.2d 1261, 1269 (8th Cir. 1991), *petition for cert. filed*, (U.S. July 2, 1991) (No. 91-14).

The court concluded that "the agency may regulate rates charged for transportation on the pipeline's own gathering facilities performed *in connection with* jurisdictional interstate transportation." *Id.* at 1263 (emphasis in original).

This decision is correct. *Colorado Interstate* and the other relevant precedents of this Court are now over forty years old. Rates for gathering charged by interstate pipelines, such as Northern, have routinely been regulated for nearly half a century, notwithstanding the claims to the contrary of Petitioner and its trade group, the Interstate Natural Gas Association of America ("INGAA").

Since the Solicitor General will undoubtedly respond to the supplementary arguments concerning legislative history and claimed conflicts with other Courts of Appeal decisions, these points will not be here addressed.

II. THE COMMISSION HAS NOT ASSERTED SELECTIVE JURISDICTION OVER GATHERING PROVIDED BY CERTAIN "NATURAL-GAS COMPANIES."

The argument in Section III of Northern's Petition for Writ of Certiorari hinges on the fact that some sales for resale in interstate commerce are made by independent producers selling gas prior to the movement on interstate pipelines. Petition for Writ of Certiorari at 24-27. As held in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 677 (1954), such producers are "natural-gas companies." Thus the syllogism is tendered: gathering charges of "natural-gas companies" are regulated; independent producers are "natural-gas companies;" therefore gathering charges

of independent producers are regulated. If the gathering charges of independent producers are not regulated, as argued by Petitioner, a case for selective jurisdiction is claimed.

The argument is misleading. It masks the fact that there are two independent bases upon which a person can become a "natural-gas company:" sales for resale service in interstate commerce and, independently, transportation service in interstate commerce. This distinction was made clear in the *Phillips* decision noted above. An independent producer does not provide the service of transportation in interstate commerce subject to the jurisdiction of the Commission.[1]

Thus, the syllogism, to be accurate, must be split into two propositions: one dealing with transportation in interstate commerce and the other dealing with sales for resale in interstate commerce. With respect to the transportation jurisdiction, gathering charges of "natural-gas companies" providing the service of transportation in interstate commerce subject to the jurisdiction of the Commission are regulated; independent producers are not "natural-gas companies" providing the service of transportation in interstate commerce subject to the jurisdiction of the Commission; therefore gathering charges of independent pro-

[1] An "independent producer" as that term is used in this part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who sells natural gas in interstate commerce for resale, but who is not engaged in the transportation of natural gas (other than gathering) by pipeline in interstate commerce.

18 C.F.R. § 154.91(a) (1991).

ducers are not properly regulated. There is no selective jurisdiction issue presented.

With respect to the sales for resale jurisdiction, the gathering charges for "natural-gas companies" making sales for resale in interstate commerce are regulated; independent producers are "natural-gas companies" making sales for resale in interstate commerce; therefore gathering charges of independent producers should be regulated, and, in fact, are regulated, to the extent that independent producer sales for resale are still subject to the jurisdiction of the Commission. Again, there is no issue of selective regulation.

For sales for resale in interstate commerce by independent producers still subject to federal price controls, the Commission does regulate the amount of gathering costs that can be included in the sale for resale rate. An allowance for gathering costs was included in the base rates calculated by the Commission, and provision was made to secure a higher allowance for gathering pursuant to Section 110 of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. § 3320 (1988).

What Petitioner Northern and INGAA fail to state is that the Congress has already decided to deregulate sales for resale in interstate commerce when made by independent producers. Partial deregulation was achieved in the NGPA of 1978. For those deregulated sales, producers are no longer "natural-gas companies." Full deregulation will occur on January 1, 1993 by operation of the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (codified in scattered sections of 15 U.S.C.).

Thus, even though there is no merit in the Northern and INGAA claims, the issue of independent producers being "natural-gas companies" will be moot in the near future. To the extent that the issue is not yet moot, producer gathering charges are regulated pursuant to Section 110 of the NGPA, for those sales of gas which still remain under price controls.

Thus, there is no issue of selective jurisdiction.

III. PETITIONER'S CLAIM THAT THE COURT BELOW "EXTENDED" JURISDICTION TO AFFILIATES INTERCONNECTED WITH INTERSTATE PIPELINES WHICH PROVIDED GATHERING SERVICE IS INACCURATE.

In *Colorado Interstate*, this Court directly addressed the gathering costs of the interstate pipeline *and* its affiliates, including Canadian River Gas Company ("Canadian"). Canadian owned gathering and transmission lines as well as natural gas production. Although owned by a separate affiliate, the affiliate and the pipeline operated as a single enterprise. This Court upheld the regulation of the rates charged by the interstate pipeline, including that portion attributable to the affiliate. 324 U.S. at 596-97.

The court below applied this precedent. *Northern Natural*, 929 F.2d at 1270. Thus, there was no "extension" of jurisdiction to affiliates by the court below.

IV. REVERSAL OF THE DECISION BELOW WOULD UNDERMINE THE COMMISSION'S EFFORT TO MITIGATE THE MONOPSONY AND MONOPOLY POWER OF PUBLIC UTILITIES PROVIDING THE SERVICE OF TRANSPORTATION OF NATURAL GAS IN INTERSTATE COMMERCE.

This case was precipitated, not by the Commission seeking for the first time to regulate the gathering

rates of Northern, but by Northern seeking to deregulate its own gathering rates by refusing to file gathering rates in a newly-filed rate case and asserting the right to charge shippers whatever Northern pleased.

This development, in turn, was precipitated by the Commission's Order No. 436[2], which sought to induce interstate pipelines to relinquish their virtual monopoly over sales of gas in interstate commerce and pro-

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[2] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, F.E.R.C. Stats. and Regs., [Regulations Preambles 1982-1985] (CCH) ¶ 30,665 (1985), *vacated and remanded sub nom. Associated Gas Distributors v. Federal Energy Regulatory Commission*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), *repromulgated as* Order No. 500, III F.E.R.C. Stats. and Regs. (CCH) ¶ 30,761 (1987), *modified*, Order No. 500-A, III F.E.R.C. Stats. and Regs. (CCH) ¶ 30,770 (1987), *modified further*, Order No. 500-B, F.E.R.C. Stats. and Regs. (CCH) ¶ 30,772 (1987), *modified further*, Order No. 500-C, III F.E.R.C. Stats. and Regs. (CCH) ¶ 30,786 (1987), *modified further*, Order No. 500-D, III F.E.R.C. Stats. and Regs. (CCH) ¶ 30,800 (1988), *reh'g denied*, Order No. 500-E, 43 F.E.R.C. (CCH) ¶ 61,234 (1988), *modified further*, Order No. 500-F, III F.E.R.C. Stats. and Regs. (CCH) ¶ 30,841 (1988), *reh'g denied*, Order No. 500-G, 46 F.E.R.C. (CCH) ¶ 61,148 (1989), *vacated and remanded, American Gas Association v. Federal Energy Regulatory Commission*, 888 F.2d 136 (D.C. Cir. 1988), Order No. 500-H, III F.E.R.C. Stats. and Regs. ¶ 30,867 (1989), *reh'g granted in part and denied in part*, Order No. 500-I, III F.E.R.C. Stats. and Regs. ¶ 30,880 (1990), *aff'd in part and remanded in part, American Gas Association v. Federal Energy Regulatory Commission*, 912 F.2d 1496 (D.C. Cir. 1990), *order on remand*, Order No. 500-J, III F.E.R.C. Stats. and Regs. (CCH) ¶ 30,915 (1991), *reh'g denied*, Order No. 500-K, 55 F.E.R.C. (CCH) ¶ 61,489 (1991), *appeal docketed sub nom. ANR Pipeline Company v. Federal Energy Regulatory Commission*, Docket No. 91-1386 (D.C. Cir. August 15, 1991).

vide "open access" transportation to third party shippers selling gas in competition with the pipeline as gas merchant. The Court of Appeals for the D.C. Circuit has characterized this movement toward open, nondiscriminatory access as perhaps one of "the three great regulatory milestones of the industry." *Associated Gas Distributors v. Federal Energy Regulatory Commission*, 824 F.2d 981, 993 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

As a part of the "open access" program, the Commission called upon interstate pipelines, if they elected to offer open access transportation, to "unbundle", or separately state, their gathering rates from the remaining transportation rates for a movement of gas in interstate commerce. That is, rather than post a single rate for the transportation of gas from the wellhead to the delivery point, the rate posted would show a component for gathering and a component for the remaining transportation. In part, this had the salutary effect of making it possible for a shipper to avoid paying a gathering rate when the pipeline's gathering facilities were not utilized by the shipper, thus avoiding cross-subsidization.

This result was encompassed in the regulations duly promulgated and now codified in 18 C.F.R § 284.7(d)(1) (1991), which states in pertinent part, "any rate filed for service subject to this section . . . must separately identify cost components attributable to transportation, storage, and gathering costs."

The Commission's Order No. 436 establishing "open access" was appealed to the Court of Appeals for the D.C. Circuit in the *Associated Gas Distributors* decision, and Northern was a party. As the court's opinion reflects, there was no challenge by Northern or

any other party on the grounds at issue in the present case. The present case may be viewed as a collateral attack on the Commission's open access regulations at 18 C.F.R. § 284.7(d)(1) (1991).

As the court below stated, "permitting a pipeline to manipulate the otherwise unregulated charges for gathering services performed over its own facilities in connection with jurisdictional interstate transportation, would, in effect, permit the pipeline to establish rates for the interstate transportation." *Northern Natural*, 929 F.2d at 1270. This result would totally circumvent the Commission's statutory mandate to ensure that rates, terms and conditions, are just and reasonable. Sections 4 and 5 of the NGA, 15 U.S.C. §§ 717c and 717d (1988).

CONCLUSION

What is at stake is whether the interstate pipelines can secure a partial restoration of their monopoly and monopsony power by being able to exact, at the gathering stage, such high rates as to render the regulation of the transportation of gas in interstate commerce a hollow formality for those captive to a pipeline gathering system. This will dampen, if not severely restrict, viable competition with interstate natural gas pipelines with respect to sales for resale in interstate commerce.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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